

**BEFORE THE
FEDERAL MARITIME COMMISSION**

Docket No. 14-06

**SANTA FE DISCOUNT CRUISE PARKING, INC. d/b/a EZ
CRUISE PARKING; LIGHTHOUSE PARKING, INC.; and
SYLVIA ROBLEDO d/b/a 81st DOLPHIN PARKING**

Complainants

v.

**THE BOARD OF TRUSTEES OF THE GALVESTON
WHARVES and THE GALVESTON PORT FACILITIES
CORPORATION**

Respondents

BRIEF OF COMPLAINANTS

**SANTA FE DISCOUNT CRUISE PARKING, INC. D/B/A EZ CRUISE PARKING
LIGHTHOUSE PARKING, INC., AND
SYLVIA ROBLEDO D/B/A 81ST DOLPHIN PARKING**

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Santa Fe Discount Cruise Parking, Inc. d/b/a EZ Cruise Parking; Lighthouse Parking, Inc.; and Sylvia Robledo d/b/a 81st Dolphin Parking (collectively “Complainants”), pursuant to the Scheduling Order dated January 14, 2015 and 46 C.F.R. 502.221, hereby submit this Complainants’ Brief. In addition to Complainants’ Brief, pursuant to the above-cited Procedural Order, Complainants simultaneously file Proposed Findings of Fact and an Appendix containing the evidence upon which Complainants’ Proposed Findings of Fact are based.

INTRODUCTION

Complainants are Santa Fe Discount Cruise Parking, Inc. d/b/a EZ Cruise Parking (“EZ Cruise”), Lighthouse Parking, Inc. (“Lighthouse”), and Sylvia Robledo d/b/a 81st Dolphin Parking (“81st Dolphin”). Complainants have each owned and operated private parking lot businesses near the Port of Galveston, serving passengers of cruise ships that have called on that port since as early as 2005.¹ Respondents are the Board of Trustees of the Galveston Wharves (“The Wharves Board”) and the Galveston Port Facilities Corporation (“GPFC”) (collectively “Respondents”). The Wharves Board has been authorized by the City of Galveston to manage and control the Port of Galveston’s wharf and terminal facilities. GALVESTON, TEX., CHARTER, art. XII, §§ 1-2 (designating Galveston Wharves as a “separate utility” of the City of Galveston to be managed by the Board of Trustees of the Galveston Wharves); *see also* TEX. TRANSP. CODE § 54.003(a).

The Wharves Board has no power to contract in the name of the City of Galveston, and the City is expressly exempt from bearing any liability for damages, indemnity or compensation associated with any undertaking, contract, action or inaction by the Board. *Id.* at § 5. The Wharves Board authority to charge for the use of facilities “shall not be excessive, but shall be

¹ Complainants Lighthouse and EZ Cruise commenced operations in 2005, while 81st Dolphin opened for business in 2006 and transferred to its current location in May 2009.

reasonable and in such amounts as will be competitive with similar charges made in such other public areas on the Texas coast.” (*Id.* at § 4.)

GPFC, a nonprofit 501(c)3 corporation, is a tenant of The Wharves Board, and operates Pier 25 (“Terminal 1”) and Pier 27 (“Terminal 2”) (collectively “Cruise Terminal”). (PFF ¶ 5 Depo. M. Mierzwa at 10:19 – 12:3.) GPFC functions independently as a tenant of the Wharves Board and the Cruise Terminal’s operator, and is responsible for any obligations that are owed to the cruise lines with respect to running the Cruise Terminal. (PFF ¶ 5, Depo. M. Mierzwa at 33:7 – 34:6); TEX. TRANSP. CODE § 431.101(a.) GPFC pays the Wharves Board ground rent for Terminals 1 and 2. (PFF ¶ 10, Depo. M. Mierzwa at 40:4-8.) GPFC obtains revenue by collecting passenger wharfage, dockage and cargo wharfage from the cruise lines. (PFF ¶ 6, Depo. M. Mierzwa at 15:8 – 19:13, and at 42:17 – 43:6, and 86:23-24.) The relationship between the Wharves Board and GPFC is solely that of landlord and tenant, and not a partnership or joint venture. (PFF ¶ 9, Depo. M. Mierzwa at 45:1-20, 83:3-6.)

GPFC does not charge fees to commercial vehicles that access the Cruise Terminal to provide services to the cruise ships. (PFF ¶ 6, Depo. M. Mierzwa at 23:5 – 24:16.) GPFC does not charge anyone to access the Cruise Terminal. (PFF ¶ 6, Depo. M. Mierzwa at 36:9-15.) However, the Wharves Board charges access fees to certain commercial vehicles that transport passengers to and from the Cruise Terminal under its Tariff. (*Id.*) The “Access Fees” are being charged by the Wharves Board to cover the amount by which the Wharves Board’s and GPFC’s expenses of the Cruise Terminal operation exceed revenues that GPFC obtains through agreements with cruise lines. (PFF ¶ 15, Depo. M. Mierzwa at 80:25 – 87:12, and 91:8-24) Accordingly, access fees are charged based on an amount necessary to cover not only Wharves Board’s costs and expenses, but those born by its tenant as well. (*Id.*)

The Wharves Board also operates two Cruise Terminal parking lots that park passenger vehicles in direct competition with Complainants' lots. The Wharves Board's parking lots are herein identified as Lot "A" (located off Old Port Industrial Road behind the entrance at 33rd Street) and Lot "B" (located off 33rd Street across Harborside Drive). In total and at maximum capacity, the Wharves Board's parking lots can accommodate approximately 2,567 vehicles. In December of 2010, the Wharves Board entered into an Economic Development Agreement with Carnival Corporation ("Carnival") and GPFC, whereby Carnival partnered with the Wharves Board in its cruise parking operation to increase its market share in exchange for twenty-five (25%) percent of revenues over \$2.5 million dollars. (PFF ¶ 36, Depo. M. Mierzwa at 58:21 – 61:12.)

The Wharves Board and GPFC, individually and/or collectively, constitute marine terminal operators that control and/or furnish wharf, dock, and other marine terminal facilities and services at the Port of Galveston, in connection with common carriers engaged in U.S. coastwise foreign commerce.

COMPLAINANTS' OPERATIONS IN THE PORT OF GALVESTON

Complainants operate private parking lots in close proximity to the Cruise Terminal, where cruise passengers can pay economical rates for parking their vehicles while away on cruises. Currently, EZ Cruise's lot can accommodate approximately 413 vehicles, Lighthouse's lot can accommodate approximately 230 vehicles, and 81st Dolphin's lot can accommodate approximately 135 vehicles.

One crucial aspect of Complainants' business is their ability to transport cruise passengers and their luggage to and from the Cruise Terminal in vehicles, which Complainants own and/or operate.

The revenues brought in by GPFC are not enough to cover the expenses of GPFC. (PFF ¶ 14, Depo. M. Mierzwa at 73:8-14.) To fund the difference between the revenue taken in by GPFC from cruise lines and the expenses of both the Wharves Board and GPFC associated with the Cruise Terminal operation (hereinafter the “Delta”), the Wharves Board charges Access Fees to certain commercial vehicles that transport passengers to and from the Cruise Terminal (“Cruise Terminal users”). (PFF ¶ 15, Depo. M. Mierzwa at 68:11-19 and 86:10-24.) In order to determine the amount of Access Fees charged on a per-trip basis to Cruise Terminal users, the Wharves Board analyzes historical data showing their proportional volume of traffic. (PFF ¶ 17, Depo. M. Mierzwa at 68:21 – 69:18, 143:25 – 144:25.)

Until October 1, 2014, the Wharves Board historically has not charged Complainants per-trip Access Fees based upon their proportional volume of traffic in the Cruise Terminal like other Cruise Terminal users. (PFF ¶ 42, Depo. M. Mierzwa at 68:21 – 69:18; 141:8 – 142:7; 145:13 – 146:13.) Instead, the Wharves Board has charged Complainants “per-space per-month” based upon the “market share” of parking spaces each has in proportion to those contained in the Wharves Board’s own parking lots. (*Id.*) Accordingly, prior to October 1, 2015, the Wharves Board determined the anticipated revenue generated from per-trip Access Fees, and then subtracted that sum from the Delta. (PFF ¶ 17, Depo. M. Mierzwa at 143:25 – 145:5.) Next, the Wharves Board divided the remaining portion of the Delta by the total number of parking spaces operated by Complainants and the Wharves Board to determine a per-space Access Fee charged monthly for every parking space contained in Complainants’ parking lots. (PFF ¶ 17, Depo. M. Mierzwa at 68:21 – 69:18 and 145:1-5.)

In December of 2007, the Wharves Board promulgated revised Tariff Circular No. 6 (Item No. 111 – “Other Licenses and Permits”) (hereinafter the “Tariff”), which establishes the

Decal and Access Fees the Wharves Board charges Complainants and Cruise Terminal users. (PFF ¶ 18, Board of Trustees of the Galveston Wharves – Tariff Circular No. 6 (Item 111)(5th Revised Page 3-F and 3-G).) Essentially, the Tariff in effect at that time set forth guidelines for “Port Use Permits” for entities like Complainants that desired to use, or have their vehicles and operators enter on, Cruise Terminal property for commercial purposes. To receive a permit, each applicant was required to pay an Application Fee, comply with certain liability and other insurance requirements (including, for example, naming the City of Galveston and Wharves Board as Additional Insureds), pay a Decal Fee, and pay Access Fees that were either imposed on a per-trip basis, or – for operators of off-port parking lots like Complainants – assessed on a per-parking-space, per-month basis predicated upon the number of potential revenue spaces in their respective lot(s) regardless of whether the spaces were actually occupied by passenger vehicles or used for employee parking, bus storage, or business ventures not associated with the Cruise Terminal. The Access Fee charged to Complainants from December 17, 2007 through July 1, 2014 was \$8 per-parking-space, per-month. (PFF ¶ 18, Board of Trustees of the Galveston Wharves – Tariff Circular No. 6 (Item 111)(5th Revised Page 3-F and 3-G) at 3-F, n. D.)

The following is a summary of the Tariff relating to Decal and Access Fees that were put in place at that time:

Category	Decal Fee	Access Fee
Charter Buses, and Commercial passenger vehicles (except buses) with seating capacity of 15 or more persons	\$10.00/ per-decal-per-year	\$50.00/per trip
Commercial passenger vehicles (except buses) with seating capacity of 15 persons or more	\$10.00/ per-decal-per-year	\$20.00/per trip
Commercial passenger vehicles (except buses) with seating capacity of less than 15 persons	\$10.00/ per-decal-per-year	\$10.00/per trip

Limousines with seating capacity of not more than 8 persons	\$10.00/ per-decal-per-year	-
Taxicabs with City of Galveston permits	\$7.50/ per-decal-per-year	-
Off Port Parking Users (i.e., private parking lots)	\$10.00/ per-decal-per-year	\$8.00/per-parking-space-per-month

(PPF ¶ 18, Tariff Circular No. 6, Item 111 (5th Rev. of pp. 3-F and 3-G), Notes C and D.)

Specifically, for “Off-Port Parking Users,” the Tariff provided as follows:

Those Off-Port Parking Users, . . . in operation and accessing the Texas Cruise Ship Terminal on Galveston Island®, or the Texas Cruise Ship Terminal at Pier 27, collectively the Cruise Ship Terminal Complex, as of August 15, 2006 shall, in lieu of the Access/Trip fee, be subject to a monthly Access Fee equal to the initial amount of \$8.00 per parking space located in the Off-Port Parking User’s parking facility, with number of billable parking spaces to be confirmed periodically by the Galveston Wharves. . . . Commencing on August 15, 2011, the monthly Access Fee will be adjusted on that date and on each anniversary of such date . . . to reflect increases in the Consumer Price Index for All Urban Consumers for Houston-Galveston-Brazoria, Texas . . . published by the Bureau of Labor Statistics of the United States Department of Labor. . . .

(*Id.*, (Note D (emphasis added)).)

The Tariff defined an “Off-Port Parking User” as a “commercial business entity which provides or arranges for one or more commercial passenger vehicles, courtesy vehicles, buses or shuttles, however owned or operated, to pick up or drop off passengers within a terminal complex of the Galveston Wharves in connection with the operations of a business of the user involving the parking of motor vehicles of any type at a facility located outside of the boundaries of property owned, operated or controlled by the Galveston Wharves.”

Despite expressly providing the methodology for determining annual increases to monthly Access Fees charged to Off-Port Parking Users based on consumer price index (C.P.I.) growth, the Wharves Board failed to implement such increases in 2011, 2012, or 2013. (PPF ¶ 29, Board of Trustees of the Galveston Wharves – Tariff Circular No. 6 (Item 111)(5th Revised Page 3-F and 3-G) at 3-F, n. D; Complainants’ First Amended Verified Complaint, at pg. 9.)

On April 22, 2013, the Wharves Board considered an interim report from an internal study team – made up entirely of in-house personnel – assembled to conduct research on how other ports, including local area airports, handle the issue of assessing access fees to offsite operators, specifically in regard to the Port of Galveston’s Access Fees that were (or were not) being charged to different private parking lot owners, hotels, and shuttle buses who entered into the Cruise Terminal. (PFF ¶ 30, Minutes of the Regular Monthly Meeting of the Board of Trustees of the Galveston Wharves, Monday, April 22, 2013, pp. 7 – 8.) In the meeting, Respondents’ own internal team informed them that, although there was a policy for access fees in place (contained in the Tariff), *procedures still needed to be implemented for purposes of its enforcement.* (*Id.*, at pg. 7 (emphasis added).) Further, it was also noted that “[t]he scope isn’t really just for those who operate parking interests, but also those who operate limousines, buses, taxis and other shuttle services.” (*Id.* (emphasis added).)

Further, the interim report indicated that other ports and the airports in the area charge offsite operators a registration fee consisting of a fee per vehicle (comparable to the Port’s “Decal Fee”) and also impose a fee as a percentage of what someone pays to park at an outside location, which is usually collected as a percentage of gross revenue earned by offsite operators (including limousines, buses, and shuttle services as well as offsite parking). *Id.* It was further discussed that the airports in Houston require an annual audit of each of the licensees, where companies with gross revenue below a certain threshold conduct a self-audit, and those that are above made subject to an audit on a periodic basis. (*Id.*)

The Wharves Board amended the Tariff on November 21, 2013, increasing Decal and Access Fees as follows:

Category	Decal Fee	Access Fee
Charter Buses, and Commercial passenger vehicles (except buses) with seating capacity of 15 or more persons	\$10.00/ per-decal-per-year	\$60.00/per trip
Commercial passenger vehicles (except buses) with seating capacity of 15 persons or more	\$25.00/ per-decal-per-year	\$22.86/per trip
Commercial passenger vehicles (except buses) and Limousines with seating capacity of less than 15 persons	\$15.00/ per-decal-per-year	\$11.43/per trip
Taxicabs with City of Galveston permits	\$7.50/ per-decal-per-year	-
Off Port Parking Users (i.e., private parking lots)	Dependent on seating capacity	\$9.14/per-parking-space-per-month

(PFF ¶ 31, Tariff Circular No. 6, Item 111 (6th Rev. of pp. 3-F and 3-G), Notes C and D.)

Specifically, for “Off-Port Parking Users,” the Tariff was amended as follows:

Those Off-Port Parking Users, . . . in operation and accessing the Texas Cruise Ship Terminal on Galveston Island®, or the Texas Cruise Ship Terminal at Pier 27, collectively the Cruise Ship Terminal Complex, as of August 15, 2006 **shall**, in lieu of the Access/Trip fee, be subject to a monthly Access Fee equal to the initial amount of \$8.00 per parking space located in the Off-Port Parking User’s parking facility, with number of billable parking spaces to be confirmed periodically by the Galveston Wharves. . . . ***(For Calendar Year 2014, the Access Fee will be \$9.14.)*** . . .

(*Id.*, (Note D (emphasis added)).)

However, despite the Wharves Board’s incorporation of this increase at end of the 2013 calendar year – and despite same being published as part of the 2014 Tariff – for reasons unknown, the above increases were never implemented or enforced. (PFF ¶ 31, Board of Trustees of the Galveston Wharves – Tariff Circular No. 6 (Item 111)(6th Revised Page 3-F and 3-G), Notes C and D.) Instead, the Wharves Board apparently decided to reconvene on the issue of Access Fees for Off-Port Parking Users less than six (6) months later. (PFF ¶ 32, Audio Transcription of The Board of Trustees of the Galveston Wharves Special Finance Committee Meeting on 5/12/14.)

During their meeting on May 12, 2014, the Special Finance Committee for the Wharves Board again deliberated upon issues relating to cruise terminal parking, and placed two items on the agenda: (1) Parking Access Fees, and (2) Amendment to the Tariff.² (*Id.*) According to the Committee, the total annual cost borne by GPFC for the Cruise Terminal is approximately \$7,228,158,³ which – the Committee contends – generates a \$1,486,925 loss experienced by the Port of Galveston Cruise Terminal because it only collects \$5,741,233.00 in total annual revenues. (PFF ¶ 16, Port of Galveston Analysis of Access Fees.)

The Committee and Chairman of the Board represented that the “shortfall” had to be paid from revenue generated from parking and by increasing Decal and Access Fees, which are the only other revenue stream available to cover the “loss.” (PFF ¶¶ 13 and 16, Audio Transcription of The Board of Trustees of the Galveston Wharves Special Finance Committee Meeting on 5/12/14, at pg. 12; Port of Galveston Analysis of Access Fees.)

To accomplish this, the Committee proposed a substantial departure from the \$8.00 per-space Access Fee and increased same to \$28.88 per-space charged to Off-Port Parking Users to pay down the Cruise Terminal’s alleged \$1.5M deficit. (*Id.*) From a policy standpoint, their report essentially reflected that a 261% increase was justified in order to ensure “. . . the private parking lots [like Complainants’] pay a more fair share of the [\$1.5M] in expenses.” (PFF ¶ 61, Audio Transcription of Mierzwa Interview on 5/19/14, at pg. 6.) Further, the Committee rationalized the increase as both fair and equitable to Complainants, because the Wharves Board was going to “pay the same” Access Fee for its parking spaces too. This, they posited, would generate enough Cruise Terminal revenue to offset the alleged \$7,228,158 in costs.

² See PFF ¶ 24, Board of Trustees of the Galveston Wharves – Special Finance Committee Meeting Notes, dated, Monday, May 12, 2014.

³ Inclusive of operating expenses, administrative overhead, debt service, depreciation, and R&R expense; exclusive of Ship Services.

On May 19, 2014, the Wharves Board approved the Committee's proposed 261% increase in Off-Port Parking User Access Fees, which became effective July 1, 2014. The following table summarizes the Wharves Boards' increases in Access Fees under the revised May 19, 2014 Tariff:

Access Fee Charges			
Category	2007 Tariff	May 19 Tariff	Increase
Charter Buses	\$50.00/per trip	\$60.00/per trip	+20%
Commercial passenger vehicles (except buses) with seating capacity of 15 or more persons	\$20.00/per trip (15 passengers)	\$30.00/per trip	+50%
	\$50.00/per trip (more than 15)		(-40%)
Commercial passenger vehicles (except buses) with seating capacity of less than 15 persons	\$10.00/per trip	\$20.00/per trip	100%
Taxicabs with City of Galveston permits	-	-	0%
Off Port Parking Users (i.e., private parking lots)	\$8.00/per-parking-space-per-month	\$28.88/per-parking-space-per-month	261%

((PFF ¶¶ 33 and 34, Minutes of May 19, 2014 Meeting at p. 13; Tariff Circular No. 6, Item 111 (7^h Rev. of pp. 3-F and 3-G), Notes C and D.) Tellingly, at the same time, the Wharves Board admitted that a consideration in their action of increasing the Tariff rate was to increase their market share of cruise parking. (PFF ¶ 39, Audio Transcription of The Board of Trustees of the Galveston Wharves Special Finance Committee Meeting on 5/12/14, at 32:17-20.)

In conducting their analysis of the proposed impact of the increase on Complainants' business model, the Committee simply "assumed" that Complainants have an annual occupancy between eighty and ninety percent. The Committee never asked to review Complainants' gross receipts to verify what their actual historical occupancy has been; they apparently just utilized a range that would support their determination. Nevertheless, the committee used such figures and

erroneously concluded the impact of the proposed Access Fees increase would account for between 13.19% and 14.83% of Complainants' gross revenue, as opposed to roughly 4% prior thereto. (*Id.*)

On September 22, 2014, the Wharves Board again amended the Tariff, rescinding their previous increase in Off-Port Parking User Access Fees from \$8.00 to \$28.88 per-space per-month, removing the distinction of "Off-Port Parking Users," and incorporating all herein identified Cruise Terminal users, with the exception of taxicabs, into the then-existing "per trip" Access Fee schedule previously adopted in May of 2014. (PFF ¶ 42, Depo. M. Mierzwa at 153:21-25; Audio Transcription of The Board of Trustees of the Galveston Wharves Special Finance Committee Meeting on September 22, 2014, at p. 12.) In doing so, the Wharves Board acknowledged that the Tariff had been treating Complainants differently than other Cruise Terminal users. (PFF ¶ 43, Audio Transcription of The Board of Trustees of the Galveston Wharves Special Finance Committee Meeting on September 22, 2014, at p. 4.)

ARGUMENT

I. JURISDICTION AND BURDEN OF PROOF

This action is brought pursuant to the Shipping Act of 1984, as amended, 46 U.S.C. § 40101 *et seq.* This Honorable Commission has jurisdiction over this Complaint because the Respondents are marine terminal operators within the meaning of the Shipping Act, 46 U.S.C. § 40102(14) and the actions of Respondents, which are the subject of this Complaint, constitute violations of the Shipping Act. *See* 46 U.S.C. § 41301(a)("[a]ny person may file with the Federal Maritime Commission a sworn complaint alleging a violation of this part, except Section 41307(b)(1)"); *Seacon Terminals, Inc. v. Port of Seattle*, Docket No. 90-16, 1993 WL 197325, *18 (FMC 1993) ("a marine terminal operator . . . has a statutory obligation to . . . 'refrain from

undue or unreasonable preference, prejudice . . . under sections 10(d)(3), (b)(11), and (b)(12)”). The Complainants respectfully request from the Federal Maritime Commission (“FMC” or “Commission”) reparations for injuries caused by Respondents’ violations of Section 41106(2) of the Shipping Act of 1984 (hereinafter “Shipping Act” or “Act”), for their undue and unreasonable prejudice with respect to Complainants.

Complainants also seek an order from the Commission directing Respondents to cease and desist from future violations of the Shipping Act. Respondents’ rates, tariffs and practices are unjustly and unduly discriminatory and prejudicial against Complainants.

Complainants must prove their case by a preponderance of the evidence. 5 U.S.C. § 556(d); 46 U.S.C. § 502.155; *Exclusive Tug Franchises*, 29 S.R.R. 718, 718-19 (ALJ 2001). In order to establish an allegation of unreasonable preference or prejudice, the “complainant has the burden of proving that it was subjected to different treatment and was injured as a result and the respondent has the burden of justifying the difference in treatment based on legitimate transportation factors. *Ceres Marine Terminal, Inc. v. Maryland Port Administration*, 27 S.R.R. 1251, 1270-1271 (FMC 1997) (citing *Cargill Inc. v. Waterman Steamship Corp.*, 21 S.R.R. 287 (FMC 1981)).

II. RESPONDENTS’ UNREASONABLE PRACTICES

Discriminatory tariffs are “a primary concern” of the Shipping Act. *Pacific Maritime Association v. FMC*, 543 F.2d 395, 409 (D.C. Cir. 1976). Complainants here have been charged “Access Fees” under the Wharves Board’s Tariff that are unjust, unreasonably discriminatory and prejudicial to Complainants, and/or unreasonably preferential or advantageous to other users of the Cruise Terminal that are similarly situated and/or in competitive relationships with Complainants. Through disparate treatment of Complainants based on Tariff rates charged, and

in the form of Respondents' preferential exclusion of certain port users from collection of Access Fees, coupled with Respondents' selective enforcement of the Tariff, Complainants have been burdened with an unjust economic disadvantage and a resulting *de facto* subsidization of benefits received by other Cruise Terminal users who are similarly situated and/or in a competitive relationship with Complainants.

A marine terminal operator may not “give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person.” 46 U.S.C. § 41106(2) (formerly Shipping Act § 10(d)(4) (formerly §§ 10(b)(11) & (12))). In *Ceres*, the Federal Maritime Commission (“Commission”) provided that:

In order to establish an allegation of an unreasonable preference or prejudice, it must be shown that (1) the two parties are similarly situated or in a competitive relationship, (2) the parties were accorded different treatment, (3) the unequal treatment is not justified by differences in transportation factors, and (4) the resulting prejudice or disadvantage is the proximate cause of the injury. The complainant has the burden of proving that it was subjected to different treatment and was injured as a result and the respondent has the burden of justifying the difference in treatment based on legitimate transportation factors.

Ceres Marine Terminal, Inc., 27 S.R.R. at 1270-1271.

An entity “engaged in the United States in the business of providing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier” meets the requirements for classification as a “marine terminal operator.” 46 U.S.C. § 40102(14). Cruise lines are common carriers within the meaning of the Shipping Act. *Lisa Anne Cornell and G. Ware Cornel, v. Princess Cruise Lines, Ltd. (Corp), Carnival plc, and Carnival Corporation*, 2014 WL 5316340, *5-6 (FMC 2014). Respondents provide wharfage, dock, and other terminal facilities in connection with cruise lines. Accordingly, Respondents are marine terminal operators within the meaning of the Shipping Act. (PFF ¶ 8, Depo. M. Mierzwa at 16:2 – 17:12, 33:10-25.)

The first element of Complainants' claim of unreasonable preference or advantage and unreasonable prejudice and disadvantage is met where Complainants are similarly situated and/or in a competitive relationship with other entities that, by virtue of Respondents' violations of the Shipping Act, were given undue or unreasonable preference or advantage, and/or against which, by virtue of that same conduct, Complainants suffered undue or unreasonable prejudice or disadvantage. Specifically, those entities include local hotels, parking lots, taxicabs, limousines, and buses calling on Respondents' Cruise Terminal. An entity is "similarly situated" to another when "both were seeking the benefit which was denied to the complainant." *New Orleans Stevedoring Co. v. Board of Commissioners of the Port of New Orleans*, 2001 WL 865692, *10 (FMC 2001) (citing *Volkswagenwerk v. Federal Maritime Comm'n*, 390 U.S. 261, 279 (1968); *Credit Practices of Sea-Land Service, Inc., etc.*, 25 S.R.R. 1308, 1313 (1990)). The benefit sought was and remains access to the Cruise Terminal, and application of the respective Tariff in an evenhanded and just manner.

As noted above, Complainants' businesses (1) provide a place for cruise passengers to park their vehicles, and (2) provide for the transportation of those cruise passengers from their parked vehicles to the Cruise Terminal. Similarly, local hotels/motels provide a place for cruise passengers to park their vehicles in their parking lots, and also transport those passengers to the Cruise Terminal, either in their own vehicles, or by use of taxicabs. Indeed, these hotels/motels typically own and/or operate "Courtesy Vehicles"⁴ or arrange for "Commercial Passenger

⁴ In pertinent part, "Courtesy Vehicle" is defined in Items 111(7) in the Tariff, and 111(8) in the 2014 Tariff as a commercial passenger vehicle . . . operated on property owned, leased or controlled by the Galveston Wharves [that is]:

(A) . . . owned or provided by one or more commercial business entities that: (i) arrange for the vehicle to provide transportation only incidentally to the commercial business entities primary businesses or activities, which may, for example, be off-port car rental user, off-port parking user, lodging, air transportation, special events or medical care; (ii) provide the vehicle, by purchase or lease or by contracting with another party . . .; and (iii) all sign the

Vehicles”⁵ to pick up or drop off passengers within the Cruise Terminal complex in connection with their operations outside the boundaries of property owned, operated, or controlled by the Wharves Board. In fact, during the May 12, 2014 Special Finance Meeting of the Wharves Board, the Wharves Board itself admitted that the operational effect of the hotels/motels with regard to parking cruise passengers’ vehicles and shuttling the passengers to the Cruise Terminal is “no different than [that of] a parking lot.” (PFF ¶ 21, Audio Transcription of The Board of Trustees of the Galveston Wharves Special Finance Committee Meeting on September 22, 2014 at 19:18-20.) In addition to being similarly situated, these hotels/motels are also in a competitive relationship with Complainants; in so far as vehicles that are parked in the parking lots of local hotels/motels cannot concurrently be parked in Complainants’ parking lots.

Additionally, taxicabs, limousines, and buses, like Complainants, transport passengers and their luggage into the Cruise Terminal. While these entities may not perform all functions of

application for the Port Use License and/or Port Use Permit for the Vehicle, as applicants or co-applicants[;]

(B) . . . provided for the exclusive use of officers, agents, employees, customers or invitees of any of the commercial business entities[; and]

(C) [t]here is no fare, charge or thing of value paid, demanded or expected from the people transported, directly or indirectly, for transportation, and this is effectively communicated to the traveling public. (Example: An increase in the charge for lodging or for an event could be an indirect charge, if related to transportation.)

⁵ “Commercial Passenger Vehicle” is defined in Items 111(6) in the Tariff, and 111(7) in the 2014 Tariff, as . . . a vehicle not otherwise defined in this Tariff while it is used or offered (orally or in a writing or sign) to be used, to transport one or more people to, on land, either:

(A) in exchange for a fare, charge, or other thing of value (paid, demanded, or expected for the transportation service, in whole or in part, directly or indirectly, by the person transported or by another person, or otherwise); or

(B) in connection with the operations of a commercial business entity, regardless of whether a fare, charge, or other thing of value is paid, demanded or expected for the transportation service.

It shall be the presumption that a vehicle bearing the name, trade name, common name, emblem, trademark or other identification of a commercial business entity and being used to transport a passenger is a commercial passenger vehicle.

Complainants' businesses—they do not operate parking lots—the disparate rates charged by Respondents for the same access to the Cruise Terminal was equally prejudicial to Complainants as was Respondents' preferential treatment of local hotels/motels. (PFF ¶ 26, Board of Trustees of the Galveston Wharves – Tariff Circular No. 6 (Item 111)(5th Revised Page 3-F) at 3-F; Depo. M. Mierzwa at 159:9 – 160:23, 161:18 – 163:2.) Furthermore, these entities are often working in concert with local hotels/motels, delivering cruise passengers who have parked their vehicles in hotel/motel parking lots to the Cruise Terminal; an arrangement which has enabled local hotels and motels to park passenger vehicles and avoid paying access fees by utilizing taxicabs [which are not charged Access Fees under the Tariff] and/or limousines [which Respondents have not enforced the Tariff against]. (PFF ¶ 22, Galveston.com – Hotel Advertisements for Cruise Parking; Hotelnparking.com – Roadway Inn Galveston Cruiseport, TX Advertisement; Audio Transcription of The Board of Trustees of the Galveston Wharves Special Finance Committee Meeting on 5/12/14, at 20:5-7, 21:6-9, 24:12-14, and 27:12-20; Mierzwa Depo. at 165:6 – 168:20; Letter from Candlewood to Mierzwa, 9/7/12.) The taxicabs, limousines, buses, and Complainants are each seeking and receiving the same benefit from Respondents; the ability to bring their customers to/from the Cruise Terminal.

Complainants have shown themselves both similarly situated and/or in direct competitive relationships with the entities named above. Accordingly, the first element of *Ceres* is met.

A complainant establishes the existence of a preference or prejudice by showing that the respondent “charges a different rate to different users for an identical service.” *Lake Charles Harbor & Terminal Dist. v. Port of Beaumont Navigation Dist.*, 10 S.R.R. 1037, 1042 (FMC 1969); *Chr. Salvesen & Co., Ltd. v. West Michigan Dock & Market Corp.*, 10 S.R.R. 745, 756 (FMC 1968). Complainants and Respondents each agree that, from December 17, 2007 through

September 30, 2014, Complainants were charged a rate dissimilar from that charged to other Cruise Terminal users that were similarly situated and/or in a competitive relationship with Complainants, including local hotels/motels, taxicabs, limousines, and buses. (PFF ¶ 43, Audio Transcription of The Board of Trustees of the Galveston Wharves Special Finance Committee Meeting on September 22, 2014, at p. 4; Audio Transcription of The Board of Trustees of the Galveston Wharves Special Finance Committee Meeting on 5/12/14, at 22:13-15.) Further, the service provided to those port users was identical; allowing access for the users' vehicles to the Cruise Terminal to drop-off/pick-up cruise ship passengers. (PFF ¶ 19, Audio Transcription of The Board of Trustees of the Galveston Wharves Special Finance Committee Meeting on September 22, 2014, at 8:18-19.) By charging Access Fees based on the total number of parking spaces maintained by Complainants, without regard to Complainants' actual access to the Cruise Terminal, rather than based on the same criteria for which the Access Fees were charged to other Cruise Terminal users who were similarly situated and/or in competitive relationships with Complainants, the Wharves Board violated the Shipping Act.

Significantly, the Chairman of the Wharves Board, Benjamin Holland Jr., admitted to preferential treatment of local hotels/motels when he informed Complainants' representatives that "[hotels/motels] help the [Port of Galveston] attract passengers [and he does] not want to charge them like parking lots." (PFF ¶ 24, Board of Trustees of the Galveston Wharves – Special Finance Committee Meeting Notes, dated, Monday, May 12, 2014, at p. 4.) In-line with the Chairman's preferences, and despite local hotels/motels meeting the Wharves Board's definition of "Off-Port Parking Users" and the express applicability of the 2006 and 2014 Tariff to them, local hotels/motels have not been charged Access Fees as required of "Off-Port Parking Users." (PFF ¶¶ 21 and 25, Depo. M. Mierzwa at 173:3 – 174:7; Board of Trustees of the

Galveston Wharves – Tariff Circular No. 6 (Item 111)(5th Revised Page 3-F) at 3-I.) Instead, local hotels/motels have been given preferential treatment and enjoyed further advantages of selective enforcement of the Tariff. Local hotels/motels offer the same services to cruise passengers as Complainants; cruise passengers are provided a place to park their vehicles for the duration of their cruise, and are provided transportation to and from the Cruise Terminal. (PFF ¶¶ 21 and 22, Depo. M. Mierzwa at 173:3-12; Audio Transcription of The Board of Trustees of the Galveston Wharves Special Finance Committee Meeting on September 22, 2014 at 19:18-20; Galveston.com – Hotel Advertisements for Cruise Parking; Hotelnparking.com – Roadway Inn Galveston Cruiseport, TX Advertisement; Audio Transcription of The Board of Trustees of the Galveston Wharves Special Finance Committee Meeting on 5/12/14, at 20:5-7, 21:6-9, 24:12-14, and 27:12-20; Mierzwa Depo. at 165:6 – 168:20; Letter from Candlewood to Mierzwa, 9/7/12.) This is a clear example of disparate treatment between Complainants and local hotels/motels which are similarly situated and/or in a competitive relationship with Complainants. From 2007 through 2014, Complainants should have been charged in the same manner as those hotels/motels; based on their actual access to the Cruise Terminal. Or, in the alternative, those hotels/motels should have been charged in the same manner as Complainants under the Tariff; per parking space.

This is an obvious example of discrimination; Respondents' selective enforcement of the Tariff provides an undue and unreasonable preference and advantage to the local hotels/motels, and unjustly subjects Complainants to unreasonable prejudice and disadvantage. This disparate treatment has prejudiced Complainants by allowing their similarly situated competitors, the local hotels/motels, to adjust the economics of their business (e.g., by consolidating trips) at will, and to pay less in Access Fees during months when fewer ships called on the Cruise Terminal.

Complainants were given no such freedom or advantage. Further, because taxicabs are not charged Access Fees at all, local hotels/motels that allow cruise passengers to park their vehicles in their parking lots for a fee, and arrange transportation for those passengers via taxicabs, are allowed to provide the exact same services to cruise passengers as Complainants, but without being subject to the Wharves Board's Tariff. (PFF ¶ 22, Hotelnparking.com – Roadway Inn Galveston Cruiseport, TX Advertisement; Mierzwa Depo. at 165:6 – 168:20; Letter from Candlewood to Mierzwa, 9/7/12.) Were Complainants to have enlisted taxicabs to conduct the transportation side of their businesses before the September 22, 2014 amendment to the Tariff took effect, the Access Fees charged to Complainants would not have changed by one penny. By charging Complainants based on the number of parking spaces they maintain, while charging local hotels/motels that also operate parking lots for cruise passengers based only on the number of trips each hotel's/motel's vehicles make into the Cruise Terminal, Complainants are subjected to disparate, disadvantageous, and prejudicial treatment, resulting in significant injury to their businesses.

Additionally, from December 17, 2007 through July 1, 2008, the already unjust and disparate Access Fees Complainants were subjected to, were based on Respondents' 2006 records of Cruise Terminal access, which established Access Fees based on record numbers of passengers passing through the Cruise Terminal. (PFF ¶ 46, Audio Transcription of The Board of Trustees of the Galveston Wharves Special Finance Committee Meeting on 5/12/14, at 9:18-24.) Accordingly, all entities that were charged Access Fees based on actual use of the Cruise Terminal were afforded the opportunity to pay less in Access Fees, as fewer passengers were transported to/from the Cruise Terminal. Complainants however, being charged Access Fees not

based on access to the Cruise Terminal, but on the number of parking spaces in their parking lots, enjoyed no such opportunity.

Respondents' discriminatory treatment of Complainants and selective enforcement of the Tariff goes further. Historically, Respondents have failed to charge and/or collect Access Fees from a material percentage – if not a majority – of commercial vehicles that have accessed the Cruise Terminal since the 2006 Tariff came into force. (PFF ¶ 62, Access Fees Billed Summary.) As provided above, the minutes of Respondents' April 22, 2013 meeting acknowledged that “*procedures still needed to be implemented for purposes of its enforcement.*” (PFF ¶ 30, Minutes of Regular Monthly Meeting, April 22, 2013, pp. 7) (emphasis added). Nevertheless, despite an ongoing awareness of their uneven enforcement of the Tariff, in their meeting on September 22, 2014, Respondents' representative(s) again conceded that they “still have enforcement issues” regarding Access Fees. (PFF ¶ 41, Audio Transcription of The Board of Trustees of the Galveston Wharves Special Finance Committee Meeting on 9/22/14, at 8:22 – 9:10.) By not enforcing the Tariff equally amongst all port users who are similarly situated and/or in a competitive relationship with Complainants, Respondents engaged in disparate treatment which burdened Complainants with an unreasonable prejudice and disadvantage, and resulted in economic injury.

Further still, Respondents' own records clearly show that Respondents' selective enforcement of the Tariff resulted in Complainants—who were always charged the same, full rate—subsidizing the use and benefits of the Cruise Terminal by other users that were similarly situated and/or in a competitive relationship with Complainants. Specifically, where the Tariff required vehicles of specified seating capacities to be charged a corresponding Access Fee, Respondents routinely engaged in preferential conduct with local hotels/motels by charging them

less than the Tariff required. For example, Respondents records show that the local hotel “Holiday Inn on the Beach” purchased a permit pursuant to the Tariff, for their vehicle to transport cruise passengers that parked at the hotel to and from the Cruise Terminal. (PFF ¶ 47, Holiday Inn on the Beach – Shuttle Permit Purchase (BOT 011964).) This record shows that the permit purchased was for a single vehicle with a seating capacity of fifteen (15) persons. (PFF ¶ 47, Holiday Inn on the Beach – Shuttle Permit Purchase (BOT 011964).) The Access Fee for a vehicle with a seating capacity of fifteen (15) persons from December 17, 2007 through June 30, 2014 was \$20.00 per Access/Trip. (PFF ¶ 26, Board of Trustees of the Galveston Wharves – Tariff Circular No. 6 (Item 111)(5th Revised Page 3-F and 3-G) at 3-F; Depo. M. Mierzwa at 159:9 – 160:23, 161:18 – 163:2.) However, as evidenced by Respondents’ own records, every time this hotel’s vehicle accessed the Cruise Terminal, an Access Fee of only \$10.00 was charged. (PFF ¶ 47, Invoices – Galveston Wharves (Holiday Inn) at BOT 016355 – BOT 016377.) Respondents’ preferential treatment of Holiday Inn On The Beach is not a unique circumstance. Similarly, Moody Gardens, Inc., another local hotel, is shown by Respondents’ records to have purchased permits for six vehicles, five with a seating capacity of eighteen (18) persons, and one with a seating capacity of fifteen (15) persons. (PFF ¶ 48, Moody Gardens, Inc. – Shuttle Permit Purchase (BOT 012120).) Under the then effective Tariff, the Access Fees for those vehicles should have been \$50.00 per Access/Trip and \$20.00 per Access/Trip, respectively. (PFF ¶ 26, Board of Trustees of the Galveston Wharves – Tariff Circular No. 6 (Item 111)(5th Revised Page 3-F and 3-G) at 3-F; Depo. M. Mierzwa at 159:9 – 160:23, 161:18 – 163:2.) However, for that hotel’s 3,511 recorded trips into the Cruise Terminal between January 1, 2008 and June 30, 2014, Respondents charged an Access Fee of only \$10.00 per Access/Trip. (PFF ¶ 48, Invoices – Galveston Wharves (Moody Gardens).) In fact, Respondents have

produced not a single document showing that any vehicle accessing the Cruise Terminal paid more than \$10.00 per Access/Trip. This preferential treatment by Respondents of businesses similarly situated and/or in competitive relationships with Complainants has caused significant injury to Complainants.

While evidence of this disparate treatment is found in each and every month that the Tariff has been enforced against Complainants by way of per-space per-month Access Fees, the starkest examples of same are found in Respondents' Access Fee invoices for the months of (May 2008, June 2008, September 2008, November 2008, and February 2009. During those months, despite Respondents' "Cruise Calls" calendar⁶ showing fifty-five (55) cruise ships calling on Respondents' Cruise Terminal, ***not one single entity was charged an Access Fee other than Complainants.*** (PFF ¶ 49, Galveston Wharves Historical Detailed Trial Balance, Access Fees (2008); Galveston Wharves Historical Detailed Trial Balance, Access Fees (2009); Port of Galveston Cruise Calls (2006 – 2010)).) Clearly, Complainants' Access Fees were subsidizing the benefits received by other users of the Cruise Terminal during those months. Respondents' conduct of treating Complainants different from other port users has undeniably prejudiced Complainants, placing them at an economic disadvantage compared to the other port users.

Further evidence of Respondents' failure to account for other Cruise Terminal users who should have been charged Access Fees on a per Access/Trip basis, but were in effect subsidized by Complainants, is demonstrated by the conduct of limousine services⁷ that have historically transported cruise passengers to/from the Cruise Terminal. According to all invoices produced

⁶ PFF ¶ 49, Port of Galveston Cruise Calls (2006 – 2010).

⁷ "Limousine" is defined in Item 111(10) in the 2014 Tariff as "a motor vehicle operated for commercial purposes that shall not have a taximeter, which is a luxury sedan with a manufacturer's rated seating capacity of not more than fifteen (15) passengers that is used for the transportation of people."

by Respondents, between January 1, 2008 and December 31, 2013, not a single limousine service was charged an Access Fee for use of the Cruise Terminal. (PFF ¶ 62, Summary - Cruise Terminal Users Invoiced for Access Fees.) In fact, it was not until March of 2014 that evidence emerges of enforcement of the Tariff when an Access Fee was charged to a limousine. (PFF ¶ 62, Invoices – Galveston Wharves (Avanti Transportation) at BOT 017224.) While it might be argued, despite evidence that limousines were consistently purchasing permits throughout that six year period, that not a single one ever accessed the Cruise Terminal, the Wharves Board demonstrates otherwise. (PFF ¶ 62, Galveston Wharves Historical Detailed Trial Balance, Access Fees (all years).) During the Wharves Board’s March Finance Meeting, Mr. Mark Murchison acknowledged that since Respondents began *actually enforcing* the Tariff’s per-trip Access Fees on limousines, many of those users have altogether stopped bringing passengers to the Cruise Terminal. (PFF ¶ 51, Audio Transcription of The Board of Trustees of the Galveston Wharves Special Finance Committee Meeting on March 30, 2015, at 5:23-6:3.) Whether this conduct by Respondents was intended to be preferential to limousines or prejudicial to Complainants, it amounts to disparate treatment, placing Complainants at a disadvantage that was altogether unreasonable. The unfair, preferential application of an already prejudicial Tariff resulted in Complainants effectively subsidizing these limousines’ use and benefit of the Cruise Terminal, causing economic injury to Complainants.

Similar to the preferential treatment enjoyed by local hotels/motels and limousines, between January 1, 2008 and June 30, 2014, Respondents gave preferential and advantageous treatment to buses as well. Under the Tariff in effect during that time period, buses with a seating capacity of more than fifteen (15) persons were to pay an Access Fee of \$50.00 per Access/Trip. (PFF ¶ 26, Board of Trustees of the Galveston Wharves – Tariff Circular No. 6

(Item 111)(5th Revised Page 3-F and 3-G) at 3-F; Depo. M. Mierzwa at 159:9 – 160:23, 161:18 – 163:2.) However, Respondents’ own invoices clearly show that not one single bus that entered the Cruise Terminal during that time period was charged more than \$10.00 per Access/Trip. (PFF ¶ 62, Summary - Cruise Terminal Users Invoiced for Access Fees.) While these Cruise Terminal users who are similarly situated and/or in a competitive relationship with Complainants enjoyed the benefits and advantages of Respondents’ selective enforcement of the Tariff and preferential treatment, Complainants were charged a disparate and unjust monthly Access Fee, without variance.

The Tariff propounded by the Wharves Board also provides taxicabs access to the Cruise Terminal, just as it provides for that exact same access by Complainants. However, unlike the Access Fees charged to Complainants, the Wharves Board has consistently waived Access Fees for taxicabs. (PFF ¶ 26, Board of Trustees of the Galveston Wharves – Tariff Circular No. 6 (Item 111)(5th Revised Page 3-F and 3-G) at 3-F; Depo. M. Mierzwa at 159:9 – 160:23, 161:18 – 163:2.) As evidenced in advertisements by local hotels/motels that operate parking lots for cruise passengers but do not have their own transportation service, taxicabs fill the role of a shuttle service. (PFF ¶ 22, Hotelnparking.com – Roadway Inn Galveston Cruiseport, TX Advertisement; Galveston.com – Hotel Advertisements for Cruise Parking) In doing so, those taxicabs—and the local hotels/motels—are jointly performing the exact same service as Complainants. While performing the same service as Complainants, neither the local hotels/motels nor the taxicabs are being charged an Access Fee. By waiving the Access Fee for taxicabs, Complainants are forced to subsidize the benefits received by those taxicabs and the local hotels/motels that utilize the taxicabs for transportation of cruise passengers who park their vehicles in those hotels/motels parking lots.

Having established the first two *Ceres* elements, Complainants now show that Respondents' disparate and prejudicial treatment of Complainants was not justified by any valid transportation factor. *See Ceres Marine Terminal, Inc.*, 27 S.R.R. at 1270-1271. Traditionally recognized "transportation factors" pertain to the movement of the commodity being shipped, "such as peculiarities in the nature or transportation needs of the cargo, competition from other carriers, insufficient cargo to warrant direct service at a particular port, or conditions at a port or other facility that truly are beyond the carrier's control." *"50 Mile Container Rules" Implementation by Ocean Common Carriers Serving the U.S. Atlantic and Gulf Coast Ports*, 1987 WL 209053, *54 (FMC 1987) (citations omitted).

From December 17, 2007 through September 30, 2014, Respondents treated Complainants differently based on their status as "Off-Port Parking Users." The purpose of the Access Fee is to charge entities for the benefit of "bringing their vehicles onto the Port." (PFF ¶ 19, Audio Transcription of The Board of Trustees of the Galveston Wharves Special Finance Committee Meeting on September 22, 2014, at 8:18-19.) Complainants' vehicles access the Cruise Terminal via the same route, in the same manner, and for the same purpose as the other users of the Cruise Terminal identified herein. There is no qualitative difference in access or use of the Cruise Terminal between Complainants and those other users. All herein identified users of the Cruise Terminal, Complainants included, transport only cruise passengers and their luggage from and to the Cruise Terminal, and do so in vehicles meeting the requirements of the Tariff. Accordingly, transportation factors do not exist that justify Respondents' disparate treatment of Complainants.

The prejudices and disadvantages imposed on Complainants, and the preferential treatment and advantages bestowed upon other Cruise Terminal users that are similarly situated and/or in a competitive relationship with Complainants, are the proximate causes of

Complainants' injuries. An event or conduct is the proximate cause of an injury when, the injury was a direct result of that event or conduct. *See Boston Shipping Ass'n, Inc. v. FMC*, 706 F.2d 1231, 1240 (1st Cir. 1983) (proximate cause not shown because injury was direct result of other factor).

From December 17, 2007 through September 30, 2014, Complainants have been charged Access Fees by the Wharves Board to transport cruise passengers to/from Respondents' Cruise Terminal. The Access Fees charged to Complainants were based on the number of parking spaces located on Complainants' parking lots, and were charged every month, regardless of how many of those parking places were occupied throughout each month, and regardless of Complainants actual access to or use of Respondents' Cruise Terminal. In contrast to Respondents' treatment of Complainants, the other Cruise Terminal users identified herein were—when their Access Fees were not reduced or waived altogether—charged based on their actual access to and use of the Cruise Terminal. Had Complainants not been treated differently than the other similarly situated port users and/or those in a competitive relationship with Complainants, then Complainants would have been charged an Access Fee reflective of their use of the Cruise Terminal and would not have been caused to subsidize the use and benefits enjoyed by the other identified port users in the absence of their payment. Complainants were been charged an inflated and arbitrary Access Fee for nearly seven years.

Had the Wharves Board not assessed the Access Fees pursuant to the Tariff upon Complainants in violation of the Act, Complainants would not have been injured. Complainants injuries, fees charged in excess of Complainants' relative use of Respondents' Cruise Terminal, is a direct result of Respondents' conduct. No intervening causes exist, and Respondents' conduct is the proximate cause of Complainants' injuries.

III. COMPLAINANTS ARE ENTITLED TO REPARATIONS

As a result of the Respondents' aforementioned violations of the Shipping Act, Complainants have sustained and/or will sustain injuries and damages, including, but not limited to higher costs, unreasonable Access Fees, decreased occupancy and revenue, loss of goodwill, and reduced and/or eliminated profit margin. Complainants seek reparations for these injuries and/or damages.

The Access Fees charged from December 17, 2007 through June 30, 2014 were established based on average trip counts for individual Cruise Terminal users found in a study conducted by Respondents in 2006. (PFF ¶¶ 17 and 53, Depo. M. Mierzwa at 68:21 – 69:18, 143:25 – 145:5; Port Tariff Charges for the Year 2006 (Access Fee Study).) Those Access Fees remained the same until July 1, 2014, despite the fact that the number of cruise ships and cruise passengers in all relevant time periods since then, never reaching the numbers experienced in 2006. (PFF ¶ 46, Audio Transcription of The Board of Trustees of the Galveston Wharves Special Finance Committee Meeting on 5/12/14, at 9:18-24.) This is significant because it shows that all Cruise Terminal users were charged based on the 2006 study, unadjusted for changes in traffic or users. In 2006, 81st Dolphin is shown to comprise approximately 8.8% of the total traffic accessing the Cruise Terminal and subject to the Tariff, with EZ Cruise representing approximately 11.2%, and Lighthouse accounting for approximately 9.6% of same. (PFF ¶ 53, Depo. M. Mierzwa at 174:10 – 175:18; Port Tariff Charges for the Year 2006 (Access Fee Study).) Collectively, for purposes of the Tariff in effect from December 17, 2007 through June 30, 2014, Complainants should be responsible for 29.6% of chargeable accesses to the Cruise Terminal. (*Id.*)

The Federal Maritime Commission in *Adair v. Penn-Nordic Lines* recognized the long-standing principle that “when precise evidence measuring financial injury is unavailable because of the nature of the violation, the Commission will rely on reasonable estimations, as do the courts, so that the wrongdoer does not benefit from its misconduct.” *Adair v. Penn-Nordic Lines, Inc.*, 1991 WL 383091, *23 (FMC 1991). Respondents here admit that they did not track Complainants access to the Cruise Terminal after 2006 for the duration of this period for which Complainants seek reparations. (PFF ¶ 54, Depo. M. Mierzwa at 145:25 – 146:13.) Accordingly, the only records reflecting Complainants proportional use of the Cruise Terminal are from the year 2006. (PFF ¶ 53, Depo. M. Mierzwa at 174:10 – 175:18; Port Tariff Charges for the Year 2006 (Access Fee Study).) However, because the Access Fees allotted pursuant to the Tariff in effect during the respective time period were based on those same numbers, it is further shown a reasonable estimation to apply Complainants’ 2006 proportional use of the Cruise Terminal for that entire period.

A. COMPLAINANTS WERE OVERCHARGED

The Wharves Board’s Tariff charged Cruise Terminal users Access Fees per Access/Trip, and so users were charged based on the proportional volume of traffic that each such entity brought into the Cruise Terminal. (PFF ¶ 26, Board of Trustees of the Galveston Wharves – Tariff Circular No. 6 (Item 111)(5th Revised Page 3-F and 3-G) at 3-F; Depo. M. Mierzwa at 159:9 – 160:23, 161:18 – 163:2.) The only exceptions to this otherwise evenhanded Tariff were taxicabs—which were and are not charged Access Fees—and “Off-Port Parking Users,” such as Complainants. (PFF ¶ 26, Board of Trustees of the Galveston Wharves – Tariff Circular No. 6 (Item 111)(5th Revised Page 3-F and 3-G) at 3-F; Depo. M. Mierzwa at 159:9 – 160:23, 161:18 – 163:2.) Pursuant to the Tariff in force from January 1, 2008 through June 30, 2014,

Complainants were charged Access Fees of \$8.00 per parking space maintained in their parking lots, per month. (PFF ¶ 26, Board of Trustees of the Galveston Wharves – Tariff Circular No. 6 (Item 111)(5th Revised Page 3-F and 3-G) at 3-F; Depo. M. Mierzwa at 159:9 – 160:23, 161:18 – 163:2.)

1. 81ST DOLPHIN

In 2006, when Respondents made record of Complainants’ access to the Cruise Terminal, 81st Dolphin maintained 120 parking spaces. (PFF ¶ 53, Port Tariff Charges for the Year 2006 (Access Fee Study).) While maintaining 120 parking spaces, 81st Dolphin accounted for 8.8% of Cruise Terminal traffic. (*Id.*) From June of 2009 through August of 2009, 81st Dolphin did not operate a parking lot, and was not charged Access Fees by the Wharves Board. (PFF ¶ 3, Galveston Wharves Historical Detailed Trial Balance, Access Fees (2009) at BOT 007126 -28.) From September of 2009 through December of 2013, the parking spaces maintained by 81st Dolphin dropped by 41.6% to 50 parking spaces. (PFF ¶ 3, Invoices – Galveston Wharves (81st Dolphin) at BOT 015739 - 78.) While Respondents did not track any of Complainants’ accesses to the Cruise Terminal during this time period, where 81st Dolphin’s passenger parking capacity was reduced to 41.6% of its previous capacity, it is reasonable to assume that 81st Dolphin’s passenger transportation also fell by that same percentage, bringing its observed percentage of Cruise Terminal traffic down from 8.8% to 3.7% during this period. Then, from January of 2014 through July of 2014, 81st Dolphin increased its number of parking spaces to a total of 96. (PFF ¶ 3, Invoices – Galveston Wharves (81st Dolphin) at BOT 015779 – 015785.) At this number, 81st Dolphin business was limited to 80% of what it was in 2006. Accordingly, 81st Dolphin’s access to the Cruise Terminal can also be assumed to have been reduced to 80% of the 2006 numbers, bringing it to 7.0% of the overall Cruise Terminal traffic during this period.

Pursuant to the above, from January of 2008 through May of 2009, when 81st Dolphin possessed the same number of parking spaces as it did when it accounted for 8.8% of the overall Cruise Terminal traffic, 81st Dolphin paid \$16,320.00—or, 10.3%—of the \$158,276.52 total collected by the Wharves Board in Access Fees. (PFF ¶ 3, Galveston Wharves Historical Detailed Trial Balance, Access Fees (2008) at BOT_006374 – 76, Galveston Wharves Historical Detailed Trial Balance, Access Fees (2009) at 007126 – 27.) Accordingly, 81st Dolphin overpaid by 1.5%—or, \$2,374.14—of the total Access Fees Collected during that time period. 81st Dolphin did not operate a parking lot from June to August of 2009. (PFF ¶ 3, Galveston Wharves Historical Detailed Trial Balance, Access Fees (2009) at BOT 007126 -28.) In the same manner, as provided above, from September of 2009 through December of 2013, 81st Dolphin maintained only 50 parking spaces, and should have represented only 3.7% of the overall Cruise Terminal traffic, and accounted for that same percentage of the overall Access Fees collected during that time period. However, during that time period, 81st Dolphin paid \$20,800.00—or, 4.1%—of the \$512,081.06 total collected by the Wharves Board in Access Fees. (PFF ¶ 3, Galveston Wharves Historical Detailed Trial Balance, Access Fees (2009) at BOT 007127-28; Galveston Wharves Historical Detailed Trial Balance, Access Fees (2010) at BOT 007895 – 97; Galveston Wharves Historical Detailed Trial Balance, Access Fees (2011) at BOT 008617 – 19; Galveston Wharves Historical Detailed Trial Balance, Access Fees (2012) at BOT 009370 – 72; Galveston Wharves Historical Detailed Trial Balance, Access Fees (2009) at BOT 010134 – 37; Invoices – Galveston Wharves (81st Dolphin) at BOT 015739 - 78.) Accordingly, 81st Dolphin overpaid by 0.4%—or, \$2,048.32—of the total Access Fees collected during that time period. Likewise, and as outlined above, from January of 2014 through June of 2014, 81st Dolphin maintained 96 parking spaces, 80% of what it maintained when it represented

8.8% of the total Cruise Terminal traffic. As such, 81st Dolphin should have represented only 7.0% of the overall Cruise Terminal traffic, and accounted for that same percentage of the overall Access Fees collected during that time period. However, during that time period, 81st Dolphin paid \$4,608.00—or, 4.9%—of the \$94,087.00 total collected by the Wharves Board in Access Fees. (PFF ¶ 3, Galveston Wharves Historical Detailed Trial Balance, Access Fees (2014) at BOT 010607 – 10; Invoices – Galveston Wharves (81st Dolphin) at BOT 015779 – 015785.) Accordingly, 81st Dolphin underpaid by 2.1%—or, \$1,975.83—of the total Access Fees collected during that time period. In total, as a result of Respondents’ violations of the Shipping Act, 81st Dolphin was overcharged, and overpaid in the amount of \$2,446.63, for which 81st Dolphin seeks reparations.

2. EZ CRUISE

In 2006, when Respondents made record of Complainants’ access to the Cruise Terminal, EZ Cruise maintained 320 parking spaces. (PFF ¶ 53, Port Tariff Charges for the Year 2006 (Access Fee Study).) While maintaining 320 parking spaces, EZ Cruise accounted for 11.2% of Cruise Terminal traffic. (*Id.*) EZ Cruise maintained 320 parking spaces for the relevant period of time, until April of 2011. Then, from May of 2011 through October of 2011, EZ Cruise maintained 220 parking spaces, representing a 31.2% decrease in its parking capacity. (PFF ¶ 1, Invoices – Galveston Wharves (EZ Cruise Parking) at BOT 016146-51.) Where EZ Cruise’s passenger parking capacity was decreased by 31.2% of its 2006 capacity, it is reasonable to assume that EZ Cruise’s passenger transportation also decreased by that same percentage, bringing its observed percentage of Cruise Terminal traffic down from 11.2% to 7.7% during this period. In November of 2011, EZ Cruise’s passenger parking capacity returned to 320 spaces, and maintained same until October of 2012. (PFF ¶ 1, Invoices – Galveston Wharves (EZ Cruise

Parking) at BOT 016152-63.) Accordingly, during that time period, where EZ Cruise maintained the same number of parking spaces as it maintained in 2006 when record was kept showing its access to the Cruise Terminal, it can be expected that EZ Cruise's use of the Cruise Terminal again returned to 11.2% of the overall Cruise Terminal traffic. Finally, from November of 2012 through June of 2014, EZ Cruise increased their parking space count to 380 spaces. (PFF ¶ 1, Invoices – Galveston Wharves (EZ Cruise Parking) at BOT 016164-87.) Additionally, during that time period, EZ Cruise added “overflow” parking four months, adding 50 parking spaces to their lots each of those four months. (PFF ¶ 1, Invoices – Galveston Wharves (EZ Cruise Parking) at BOT 016166, 016168, 016171, and 016174) Included in the overall average for that time period, EZ Cruise effectively maintained 390 parking spaces between November of 2012 and June of 2014, representing an increase of 21.9% from 2006. (PFF ¶ Invoices – Galveston Wharves (EZ Cruise Parking) at BOT 016164-87, 016166, 016168, 016171, and 016174.)

Pursuant to the above, from January of 2008 through April of 2011, when EZ Cruise possessed the same number of parking spaces as it did when it accounted for 11.2% of the overall Cruise Terminal traffic, EZ Cruise paid \$102,400.00—or, 29.0%—of the \$352,423.58 total collected by the Wharves Board in Access Fees. (PFF ¶ 1, Galveston Wharves Historical Detailed Trial Balance, Access Fees (2008) at BOT 006374 – 76; Galveston Wharves Historical Detailed Trial Balance, Access Fees (2009) at BOT 007126 – 28; Galveston Wharves Historical Detailed Trial Balance, Access Fees (2010) at BOT 007895 – 97; Galveston Wharves Historical Detailed Trial Balance, Access Fees (2010) at 008617 – 18.) Accordingly, EZ Cruise overpaid by 17.8%—or, \$62,731.40—during that time period. Likewise, as outlined above, from May of 2011 through October of 2011, EZ Cruise maintained only 220 parking spaces, 68.8% of what it maintained when it represented 11.2% of the Cruise Terminal traffic. Accordingly, during that

time period, EZ Cruise should have represented only 7.7% of the Cruise Terminal traffic, and the same percentage of the Access Fees charged. However, during that time period, EZ Cruise paid \$10,560.00—or, 24.6%—of the \$42,850.00 total collected by the Wharves Board in Access Fees. Accordingly, EZ Cruise overpaid by 16.9%—or, \$7,241.65—during that time period. (PFF ¶ 1, Invoices – Galveston Wharves (EZ Cruise Parking) at BOT 016146-51; Galveston Wharves Historical Detailed Trial Balance, Access Fees (2011) at BOT 008618 -19.) Then, as provided above, from November of 2011 through October of 2012, EZ Cruise again maintained 320 parking spaces, the same number as in 2006. Therefore, it is reasonable that EZ Cruise would represent the same percentage use of the Cruise Terminal, 11.2%, as it did in 2006 when it operated 320 parking spaces. However, during this time period, EZ Cruise paid \$30,720.00—or, 24.0%—of the \$127,750.00 total collected by the Wharves Board in Access Fees. (PFF ¶ 1, Invoices – Galveston Wharves (EZ Cruise Parking) at BOT 016152-63; Galveston Wharves Historical Detailed Trial Balance, Access Fees (2011) at BOT 008619; Galveston Wharves Historical Detailed Trial Balance, Access Fees (2012) at BOT 009370 – 72.) Accordingly, EZ Cruise overpaid by 12.8%—or, \$16,352.00—during that time period. Again, as outlined above, from November of 2012 through June of 2014, EZ Cruise effectively maintained 390 parking spaces, representing an increase of 21.9% over the 2006 numbers. Therefore, where EZ Cruise represented 11.2% of the Cruise Terminal traffic when it had 320 parking spaces, at 390 parking spaces, EZ Cruise should represent 13.7% of the traffic and Access Fees collected. However, during that time period, EZ Cruise paid \$62,400.00—or, 23.7%—of the \$262,891.00 total collected by the Wharves Board in Access Fees. (PFF ¶ 1, Invoices – Galveston Wharves (EZ Cruise Parking) at BOT 016164-87; Galveston Wharves Historical Detailed Trial Balance, Access Fees (2012) at BOT 009372; Galveston Wharves Historical Detailed Trial Balance,

Access Fees (2013) at BOT 010134 – 37; Galveston Wharves Historical Detailed Trial Balance, Access Fees (2014) at BOT 010607 – 10.) Accordingly, EZ Cruise overpaid by 10.0%—or, \$26,289.10—during that time period. In total, as a result of Respondents’ violations of the Shipping Act, EZ Cruise was overcharged, and so overpaid in the amount of \$112,614.15, for which EZ Cruise seeks reparations.

3. Lighthouse

Finally, in 2006, when Respondents made record of Complainants’ access to the Cruise Terminal, Lighthouse maintained 190 parking spaces. (PFF ¶ 53, Port Tariff Charges for the Year 2006 (Access Fee Study).) While maintaining 190 parking spaces, Lighthouse accounted for 9.6% of Cruise Terminal traffic. (*Id.*) Lighthouse maintained 190 parking spaces for the relevant period of time, through December of 2013. (PFF ¶ 2, Invoices – Galveston Wharves (Lighthouse Cruise Parking) at BOT 016705 – 77.) Then, from January of 2014 through April of 2014, Lighthouse maintained 207 parking spaces, an increase of 8.9%. (PFF ¶ 2, Invoices – Galveston Wharves (Lighthouse Cruise Parking) at BOT 016778 – 83.) Finally, from May of 2014 through June of 2014, Lighthouse maintained 220 parking spaces, an increase over the 2006 number of 15.8%. (PFF ¶ 2, Invoices – Galveston Wharves (Lighthouse Cruise Parking) at BOT 016782-83.)

Pursuant to the above, from January of 2008 through December of 2013, when Lighthouse possessed the same number of parking spaces as it did when it accounted for 9.6% of the overall Cruise Terminal traffic, Lighthouse paid \$109,440.00—or, 15.8%—of the \$691,827.58 total collected by the Wharves Board in Access Fees. (PFF ¶ 2, Invoices – Galveston Wharves (Lighthouse Cruise Parking) at BOT 016705 – 77; Galveston Wharves Historical Detailed Trial Balance, Access Fees (2008) at BOT 006374 – 76, Galveston Wharves Historical Detailed Trial

Balance, Access Fees (2009) at BOT 007126-28, Galveston Wharves Historical Detailed Trial Balance, Access Fees (2010) at BOT 007895-97, Galveston Wharves Historical Detailed Trial Balance, Access Fees (2011) at BOT 008617-19, Galveston Wharves Historical Detailed Trial Balance, Access Fees (2012) at BOT 009370-72, and Galveston Wharves Historical Detailed Trial Balance, Access Fees (2013) at BOT 010134-37.) Accordingly, Lighthouse overpaid by 6.2%—or, \$42,893.30—during that time period. Then, as provided above, Lighthouse increased the number of parking spaces it maintained by 8.9% to 207 parking spaces from January of 2014 through April of 2014. Therefore, where Lighthouse represented 9.6% of the Cruise Terminal traffic when it operated 190 parking spaces, at 207 parking spaces, it represented 10.5% of Cruise Terminal traffic, and should have paid 10.5% of the Access Fees collected. However, during that time period, Lighthouse paid \$6,424.00—or, 10.0%—of the \$64,420.00 total collected by the Wharves Board in Access Fees. (PFF ¶ 2, Invoices – Galveston Wharves (Lighthouse Cruise Parking) at BOT 016778 – 83; Galveston Wharves Historical Detailed Trial Balance, Access Fees (2014) at BOT 010607 -09.) Accordingly, Lighthouse underpaid by 0.5%—or, \$3,221.00—during that time period. Again, as provided above, from May of 2014 through June of 2014, Lighthouse increased the number of parking lots it maintained to 220 parking spaces. Therefore, where Lighthouse represented 9.6% of the Cruise Terminal traffic when it operated 190 parking spaces, at 220 parking spaces, it represented 11.1% of Cruise Terminal traffic, and should have paid 11.1% of the Access Fees collected. However, during that time period, Lighthouse paid \$3,520.00—or, 11.9%—of the \$29,667.00 total collected by the Wharves Board in Access Fees. (PFF ¶ 2, Invoices – Galveston Wharves (Lighthouse Cruise Parking) at BOT 016782-83; Galveston Wharves Historical Detailed Trial Balance, Access Fees (2014) at BOT 010609-10.) Accordingly, Lighthouse overpaid by 0.8%—or, \$237.33—during

that time period. In total, as a result of Respondents' violations of the Shipping Act, Lighthouse was overcharged, and so overpaid in the amount of \$39,909.63, for which Lighthouse seeks reparations.

B. COMPLAINANTS SUBSIDIZED BENEFITS RECEIVED BY OTHER USERS

Complainants seek reparations for injuries suffered as a result of the Wharves Board's increased Access Fees from July 1, 2014 through present. On May 19, 2014, the Wharves Board adopted an amendment to the Tariff, which increased Access Fees charged for access to the Cruise Terminal, effective July 1, 2014. (PFF ¶ 32, Minutes of the Regular Monthly Meeting of the Board of Trustees of the Galveston Wharves, Monday, May 19, 2014.) The Wharves Board justified the increase in Access Fees by stating that same was necessary to satisfy an asserted \$1.5M deficit in Respondents' Cruise Terminal operations. (PFF ¶ 61, Audio Transcription of Mierzwa Interview on 5/19/14, at pg. 6.) This increase subjects Complainants to injury by virtue of the fact that, while Complainants always paid the Access Fees as required by the Tariff, Respondents engaged in routine, long-standing preferential enforcement of the Tariff, exempting some Cruise Terminal users completely, and significantly undercharging a great majority of others. Specific examples of same follow:

Limousines – As outlined above, from January 1, 2008 through December 31, 2013, not a single limousine was charged Access Fees. (PFF ¶¶ 50 and 62, Summary – Cruise Terminal Users Invoiced for Access Fees.) The Tariff proscribed Access Fees of \$10.00 per Access/Trip for limousines. (PFF ¶ 26, Board of Trustees of the Galveston Wharves – Tariff Circular No. 6 (Item 111)(5th Revised Page 3-F and 3-G) at 3-F; Depo. M. Mierzwa at 159:9 – 160:23, 161:18 – 163:2.) Because Respondents did not keep records of access of the Cruise Terminal by limousines during that time period, but did record such access during 2014, a reasonable

estimation of such access can be attained by applying the 2014 record of limousine access to the missing years. *See Adair*, 1991 WL 383091 at *23 (“when precise evidence measuring financial injury is unavailable because of the nature of the violation,” reasonable assumptions can be made). In 2014, Respondents recorded 274 accesses to the Cruise Terminal by limousines. (PFF ¶ 60, Summary – Cruise Terminal Users Invoiced for Access Fees; *see also* Abiding Limo Access Fees at BOT 017192 – 93); Action Limo Access Fees, at BOT 017194 – 201; AIM Limo Access Fees at BOT 017206 – 10; American Standard Limo Access Fees at BOT 017213 – 14; Avanti Transport Access Fees at BOT 017223 – 27; Best Limo Access Fees at BOT 017228 – 30; Blackhorse Limo Access Fees at BOT 017233 – 43; Cheap Town Car Limo Access Fees at BOT 017248 – 54; Colony Limo Access Fees at BOT 017278 – 81; Devine TownCar & Limo Access Fees at BOT 017297 – 303; Envoy Executive Limo Access Fees at BOT 017308 – 16; Galveston Limo Access Fees at BOT 017336; Gemini Limo Access Fees at BOT 017341 – 43; Gulf Coast Limo Services Access Fees at BOT 017347 – 54; Lonestar Executive Limo Access Fees at BOT 017359 – 62; Merlo’s Limo’s Access Fees at BOT 017370 – 87; Reliance Limo & Town Car Access Fees at BOT 017397 – 99; South Houston Limo Access Fees at BOT 017414 – 24; Superior Limo Access Fees at BOT 017438 – 52; Z Limo Services Access Fees at BOT 017462 – 70). Applying that number to each year between January 1, 2008 and December 30, 2013, it is shown that Respondents preferential treatment of limousines resulted in \$2,740.00 in uncollected Access Fees, for which Complainants were forced to subsidize.

Buses – From January 1, 2008 through December 31, 2013, only twelve (12) out of 283 recorded bus entries into the Cruise Terminal were charged the required Access Fee pursuant to the Tariff. (PFF ¶ 59, Clear Lake Shuttle Bus Access Fees at BOT 017260 – 69 (ALJ App. ___); Royal Carriages Access Fees at BOT 017402 – 04; *see also* Summary – Cruise Terminal Users

Invoiced for Access Fees.) Throughout the identified time period, the Access Fee for buses with a seating capacity of more than fifteen (15) persons was set at \$50.00 per Access/Trip. (PFF ¶ 26, Board of Trustees of the Galveston Wharves – Tariff Circular No. 6 (Item 111)(5th Revised Page 3-F and 3-G) at 3-F; Depo. M. Mierzwa at 159:9 – 160:23, 161:18 – 163:2.) Further, it is apparent from Respondents’ records as produced in discovery that Respondents failed to charge Access Fees at all to a majority of buses accessing the Cruise Terminal. This failure to charge buses is evidenced by the seemingly anomalous and immediate appearance of buses at the Cruise Terminal—the same ones which had been purchasing access permits pursuant to the Tariff since at least 2007—in 2014, when Respondents began to pursue enforcement of the Tariff. (PFF ¶ 62, Summary – Cruise Terminal Users Invoiced for Access Fees.) Accordingly, it is reasonable to assume that those same buses were accessing the Cruise Terminal in similar numbers throughout the years beginning in 2008. *See Adair*, 1991 WL 383091 at *23 (“when precise evidence measuring financial injury is unavailable because of the nature of the violation,” reasonable assumptions can be made). Taking the recorded accesses of buses to the Cruise Terminal in that time period which were charged \$10.00 instead of the required \$50.00, Respondents are shown to have failed to collect \$10,840.00 from 271 buses. (PFF ¶ 62, Summary – Cruise Terminal Users Invoiced for Access Fees; *see also* Clear Lake Shuttle Bus Access Fees at (BOT 017260 -69); and Royal Carriages Access Fees at (BOT 017402 -04.) In 2014, the Respondents recorded 385 buses accessing the Cruise Terminal. (PFF ¶ 60, (Summary – Cruise Terminal Users Invoiced for Access Fees); *see also* AFC Corporate Transportation Access Fees at BOT 017203 – 05; Clear Lake Shuttle Bus Access Fees at BOT 017270 - 77; Daisy Tours & Conventions Access Fees at BOT 017294 – 96; Finesse Transportation Access Fees at BOT 017318; Galveston Limo Access Fees at BOT 017336; Garcia Garcia Access Fees

at BOT 017338; Gaten Adventures Access Fees at BOT 017340; Gotta Go Trailways Access Fees at BOT 017345 – 46; J&J Tours Access Fees at BOT 017357 – 58; Merlo’s Limo’s Access Fees at BOT 017371 – 77; Primavera Access Fees at BOT 017390 – 91; Royal Carriages Access Fees at BOT 017405 – 13; Transportation Unlimited Access Fees at BOT 017454 – 55; Western Motorcoach, Inc. Access Fees at BOT 017457; Wynn Coaches Access Fees at BOT 017459 – 61). Applying the 2014 accesses of buses, excluding the accounted for undercharged accesses, to the remainder of the relevant time period, it is shown that Respondents failed to collect \$115,500.00 in Access Fees from buses. *Id.* Collectively, Respondents’ preferential treatment of buses resulted in Complainants subsidizing the benefits received by those buses in the amount of \$104,660.00.

Taxicabs – The Wharves Board has preferentially exempted taxicabs from assessment of Access Fees under the Tariff since before January 1, 2008. (PFF ¶ 26, Board of Trustees of the Galveston Wharves – Tariff Circular No. 6 (Item 111)(5th Revised Page 3-F and 3-G) at 3-F; Depo. M. Mierzwa at 159:9 – 160:23, 161:18 – 163:2.) As the Wharves Board stated in its September 22, 2014 meeting, the Access Fees are charged “for [users] bringing their vehicles onto the Port.” (PFF ¶ 19, Audio Transcription of The Board of Trustees of the Galveston Wharves Special Finance Committee Meeting on September 22, 2014, at 8:18-19.) The benefits enjoyed by taxicabs at no cost—access to the Cruise Terminal to deliver/pick-up passengers—are the same benefits paid for and subsidized by Complainants.

Hotels/Motels – The Tariff in force between January 1, 2008 and June 30, 2014 required vehicles with a seating capacity of greater than fifteen (15) persons to pay an Access Fee of \$50.00 per Access/Trip, vehicles with a seating capacity of fifteen (15) to pay an Access Fee of \$20.00 per Access/Trip, and vehicles with a seating capacity of less than fifteen (15) to pay

\$10.00 per Access/Trip.. (PFF ¶ 26, Board of Trustees of the Galveston Wharves – Tariff Circular No. 6 (Item 111)(5th Revised Page 3-F and 3-G) at 3-F; Depo. M. Mierzwa at 159:9 – 160:23, 161:18 – 163:2.) Despite many of the local hotels/motels providing transportation to/from the Cruise Terminal for cruise passengers in vehicles with seating capacities of fifteen (15) persons and over, not a single one of those hotels/motels was charged more than \$10.00 per Access/Trip. This preferential enforcement of the Tariff has caused injury to Complainants, for which they seek reparations.

Respondents' records show that Moody Gardens, Inc., a local hotel, purchased permits for six vehicles, five with a seating capacity of eighteen (18) persons, and one with a seating capacity of fifteen (15) persons. (PFF ¶ 48, Moody Gardens, Inc. – Shuttle Permit Purchase (BOT 012120).) Between January 1, 2008 and June 30, 2014, this hotel accessed the Cruise Terminal 3,511 times, each time being charged an Access Fee of only \$10.00. (PFF ¶ 48, Invoices – Galveston Wharves (Moody Gardens).) At a minimum, assuming that each of those trips was made using the hotel's smallest vehicle, Respondents undercharged the hotel by \$35,110.00. However, Complainants assert that, because Respondents failed to keep record of the seating capacity, for correct Access Fee charges, of the vehicles the hotel accessed the Cruise Terminal with, a reasonable assumption would be that the hotel used its permitted vehicles proportionately. Accordingly, five-sixths of the hotels accesses to the Cruise Terminal should have been charged \$50.00 per Access/Trip, and the remainder should have been charged an Access Fee of \$10.00. This results in a showing the Respondents' preferential enforcement of the Tariff with regards to Moody Gardens, Inc. resulted in an unjustified failure by Respondents to collect \$157,970.00 in Access Fees.

Respondents' records show that Holiday Inn On The Beach, a local hotel, purchased a permit to access the Cruise Terminal for one vehicle with a seating capacity of fifteen (15) persons. (PFF ¶ 47, Holiday Inn on the Beach – Shuttle Permit Purchase (BOT 011964).) Accordingly, under the Tariff in force between January 1, 2008 and June 30, 2014, this hotel should have been charged an Access Fee of \$20.00 per Access/Trip. (PFF ¶ 26, Board of Trustees of the Galveston Wharves – Tariff Circular No. 6 (Item 111)(5th Revised Page 3-F and 3-G) at 3-F; Depo. M. Mierzwa at 159:9 – 160:23, 161:18 – 163:2.) During that relevant time period, Respondents recorded the hotel accessing the Cruise Terminal 213 times, for each of which the hotel was charged an Access Fee of only \$10.00. (PFF ¶ 47, Invoices – Galveston Wharves (Holiday Inn) at BOT 016355 – BOT 016377.) Accordingly, Respondents preferential enforcement of the Tariff with regards to Holiday Inn On The Beach resulted in an unjustified failure by Respondents to collect \$2,130.00 in Access Fees.

Respondents' records show that Galveston Seawall Motel, LTD d/b/a Comfort Inn & Suites, a local motel, purchased a permit for one vehicle with a seating capacity of twenty-five (25) to access the Cruise Terminal. (PFF ¶ 57, Comfort Inn – Shuttle Permit Purchase (BOT 011946 -47).) Pursuant to the Tariff in effect between January 1, 2008 and June 30, 2014, this motel should have been charged an Access Fee of \$50.00 per Access/Trip. (PFF ¶ 26, Board of Trustees of the Galveston Wharves – Tariff Circular No. 6 (Item 111)(5th Revised Page 3-F and 3-G) at 3-F; Depo. M. Mierzwa at 159:9 – 160:23, 161:18 – 163:2.) During that relevant time period, Respondents recorded the motel accessing the Cruise Terminal 184 times, for each of which the motel was charged an Access Fee of only \$10.00. (PFF ¶ 57, Invoices – Galveston Wharves (Comfort Inn) at BOT 015846 – BOT 015854.) Accordingly, Respondents preferential

enforcement of the Tariff with regards to Galveston Seawall Motel, LTD d/b/a Comfort Inn & Suites resulted in an unjustified failure by Respondents to collect \$7,360.00 in Access Fees.

Respondents' records show that The San Luis Resort, Spa and Conference Center, a local hotel, purchased permits for four vehicles, one with a seating capacity of eighteen (18) persons, one with a seating capacity of fifteen (15) persons, and two with seating capacities of less than fifteen (15) persons. (PFF ¶ 58, San Luis Hotel – Shuttle Permit Purchase (BOT 011963).) Between January 1, 2008 and June 30, 2014, this hotel accessed the Cruise Terminal 8,167 times, each time being charged an Access Fee of only \$10.00. (PFF ¶ 58, Invoices – Galveston Wharves (San Luis Hotel) at BOT 016954 – BOT 017031.) Because Respondents failed to keep record of the seating capacity of vehicles accessing the Cruise Terminal, for correct Access Fee charges, until September of 2014, a reasonable assumption would be that the hotel used its permitted vehicles proportionately. Accordingly, 25% of the hotels accesses to the Cruise Terminal should have been charged \$50.00 per Access/Trip, 25% at \$20.00 per Access/Trip, and the remainder should have been charged an Access Fee of \$10.00. This results in a showing the Respondents' preferential enforcement of the Tariff with regards to The San Luis Resort, Spa and Conference Center resulted in an unjustified failure by Respondents to collect \$102,060.00 in Access Fees.

The Wharves Board maintains that the reason it decided to increase the Access Fees in May of 2014, effective July 1, 2014, was because Respondents' Cruise Terminal was operating at a deficit of \$1.5M, and the Access Fees were to make up that deficit. (PFF ¶ 15, Depo. M. Mierzwa at 68:11-19, 80:25 – 87:12, and 91:8-24.) Respondents' preferential treatment of the above-listed hotels/motels resulted in injury to Complainants on May 19, 2014, when Respondents' unjustified conduct resulted in an increase to Complainants' Access Fees. Had

Respondents not engaged in preferential treatment to Complainants' disadvantage, Respondents would have collected an additional \$269,520.00 in Access Fees from the above-listed hotels/motels, \$104,660.00 from buses, and \$2,740.00 from limousines accessing the Cruise Terminal (no data is available regarding taxicab access). This would have reduced Respondents' asserted deficit by a total of \$376,920.00, or 25.1%. Accordingly, Complainants seek reparations equaling 25.1% of all increases to their Access Fees from July 1, 2014 through present.

IV. CEASE AND DESIST

Notwithstanding the foregoing, even now, Respondents still seek to impose Access Fees which provide an unreasonable preference and/or advantage on certain Cruise Terminal users, while effecting an unreasonable prejudice and/or disadvantage against Complainants. To establish a claim of this nature, Complainants are again required to meet the *Ceres* elements outlined above. Complainants reassert and adopt their showing, *supra*, of the "similarly situated" and/or "competitive relationship" status pertaining to other users of the Cruise Terminal. (*See supra* at 14-25; *see also Ceres Marine Terminal, Inc*, 27 S.R.R. at 1270-1271.)

The Wharves Board's 2014 amendment to the Tariff, as effective October 1, 2014, is unreasonably prejudicial and discriminatory against Complainants; even as modified it still favors taxicabs over other similarly situated commercial passenger vehicles accessing the Cruise Terminal, like those operated by Complainants. The current Tariff wholly exempts taxicabs from paying per-trip Access Fees, while requiring Complainants to pay an Access Fee of \$20.00 to \$30.00 per trip. (PFF ¶ 33, Board of Trustees of the Galveston Wharves – Tariff Circular No. 6 (Item 111)(7th Revised Page 3-F and 3-G).)

This unequal treatment is not justified by differences in transportation factors. Both Complainants and the exempted taxicabs seek the same service from Respondents, vehicular access to the Cruise Terminal. Both Complainants and the exempted taxicabs perform the same function and make the same use of the Cruise Terminal, transporting cruise passengers to/from the Cruise Terminal. Under the 2014 Tariff as amended in September of that year, taxicabs and Complainants each enjoy the benefits of the Cruise Terminal. However, by not charging taxicabs the Access Fees that Respondents claim to be essential for the maintenance and development of the Cruise Terminal, Complainants are being caused to continue subsidizing the benefits received by the taxicabs.

As a result of this conduct by the Wharves Board, Complainants are prejudiced and placed at a disadvantage. The prejudice and disadvantage suffered by Complainants—i.e., effective subsidization of other users of the Cruise Terminal—causes injury to Complainants by requiring them to pay higher Access Fees than would otherwise be necessary to cover the expenses of the Cruise Terminal were taxicabs charged the same for vehicular access to the Cruise Terminal. (PFF ¶ 15, Depo. M. Mierzwa at 68:11-19, 80:25 – 87:12, and 91:8-24.) Accordingly, the prejudice and disadvantage caused by the Wharves Board's actions in exempting taxicabs from paying Access Fees is the proximate cause of Complainants' injuries. Complainants ask that the Wharves Board be caused to cease and desist enforcement of the Tariff until it is amended to conform to Section 41106(2) of the Shipping Act of 1984.

CONCLUSION

Respondents have acted in violation of Section 41106(2) of the Shipping Act of 1984. Respondents' violations of the Shipping Act have given undue and unreasonable preference and advantage to local hotels/motels, buses, limousines, and taxis; and has imposed undue and

unreasonable prejudice and/or disadvantage on Complainants. Therefore, Complainants respectfully request the Commission to grant them the following relief:

- (A) an order requiring Respondents to pay Complainants reparations in the following amounts:
 - a. 81st Dolphin in the amount of \$2,446.63;
 - b. EZ Cruise in the amount of \$112,614.15; and
 - c. Lighthouse in the amount of \$39,909.63;
- (B) an order requiring Respondents to cease and desist from any further violations of the Shipping Act of 1984 (as amended and codified);
- (C) an order requiring Respondents to cease and desist from enforcing the Tariff as amended on September 22, 2014;
- (D) an order requiring Respondents to pay Complainants, each individually, reparations in the amount equaling 25.1% of the payments they have each individually made for Access Fees charged from July 1, 2014 through present; and
- (E) such other and further relief as the Commission deems appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed this document on this **1st day of May, 2015**, and that a true and correct copy of the foregoing was served on all counsel of record *via* certified mail – return receipt requested and email, as indicated below:

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